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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 JOANNE FARRELL,

12 Plaintiff,

13 v.

14 BANK OF AMERICA, N.A.,

15 Defendant.

Case No.: 3:16-cv-00492-L-WVG

**ORDER GRANTING DEFENDANT'S  
MOTION [Doc. 29] FOR  
CERTIFICATION OF  
INTERLOCUTORY APPEAL AND  
STAY**

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17 Pending before the Court is Defendant Bank of America's ("BoA") motion for  
18 certification of interlocutory appeal and stay. The Court decides the matter on the papers  
19 submitted and without oral argument. See Civ. L. R. 7.1(d)(1). For the reasons stated  
20 below, the Court **GRANTS** BoA's motion.

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1 **I. BACKGROUND**

2 This case is a putative class action focused on BoA’s practice of levying \$35 fees  
3 (“Extended Charges”) against deposit account holders for failing to rectify an overdrawn  
4 deposit account within five days. To open a deposit account with BoA, a customer must  
5 first execute a Deposit Agreement [Doc. 8-3]. Under the terms of the Deposit Agreement  
6 BoA charges a \$35 fee (the “Initial Charge”) anytime a deposit account holder writes a  
7 check against insufficient funds. When a deposit account holder thus overdrafts his or  
8 her account, the BoA has discretion as to whether to honor the overdrawn check by  
9 advancing funds to the payee sufficient to cover the note. However BoA levies the Initial  
10 Charge whether it advances the fees or not. In the event BoA does advance the funds, the  
11 deposit account holder is obligated under the Deposit Agreement to pay back BoA’s  
12 advance and any fees incurred. Failure to do so within five days triggers an Extended  
13 Charge.

14 Plaintiff wrote some checks against insufficient funds. BoA honored the checks  
15 but charged her \$35 Initial Charges for not having sufficient funds. When Plaintiff failed  
16 to remedy her negative account balance within five days, BoA levied an Extended  
17 Charge. Because the Extended Charges, as a percentage of her negative account balance,  
18 exceeded the interest rate permitted by the National Banking Act, Plaintiff filed this  
19 putative class action against BoA, alleging violation of 12 U.S.C. §§ 85, 86 (the “NBA”).  
20 (See Compl.) BoA moved to dismiss Plaintiff’s Complaint, arguing that the Extended  
21 Charges were not “interest” and therefore cannot trigger the NBA. (See MTD [Doc. 8].)  
22 The Court disagreed and therefore denied BoA’s motion. (See MTD Order [Doc. 20].)  
23 BoA now moves for permissive certification of interlocutory appeal pursuant to 28  
24 U.S.C. § 1292 and a stay pending the outcome of appeal. Plaintiff opposes. (See Opp’n  
25 [Doc. 47].)

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## 1 **II. DISCUSSION**

2 As a general matter, a party may only appeal final decisions that dispose of a case  
3 before the district court. 28 U.S.C. § 1291. However, 28 U.S.C. § 1292(b) provides a  
4 narrow exception to this final judgment rule. Under § 1292(b), a district court may  
5 permit a party to petition the circuit court for review of an interlocutory decision  
6 concerning (1) a controlling question of law about which (2) there is substantial grounds  
7 for a difference in opinion and (3) resolution of which may materially advance the  
8 termination of the litigation. *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010)  
9 (*citing* 28 U.S.C. § 1292(b)).

10 The relevant question of law here is whether the Extended Charges constitute  
11 interest rather than 12 C.F.R. § 7.4002 authorized deposit account service charges. If the  
12 Extended Charges are interest, Plaintiff's claims survive. On the other hand, if the  
13 Extended Charges are instead 12 C.F.R. § 7.4002 authorized deposit account service  
14 charges, Plaintiff's claims must be dismissed with prejudice. Thus, there can be no  
15 question that this is a controlling question of law and that its resolution may materially  
16 advance the termination of the litigation.<sup>1</sup>

17 There are also reasonable grounds for a difference of opinion on this issue. As the  
18 Court noted in its order denying BoA's motion to dismiss, there is no binding authority  
19 that addresses this specific issue. However, at least three district court cases have  
20 considered it. All three reached the conclusion that Extended Charges do not constitute  
21 interest under § 85. *Mcgee v. Bank of America, N.A.*, 2015 WL 4594582 (S.D. Fla 2015);  
22 *Shaw v. BOKF, Nat. Ass'n*, 2015 WL 6142903 (N.D. Okla. 2015); *In re TD Bank, N.A.*,  
23 150 F. Supp. 3d 593 (D.S.C. 2015). Though this Court disagrees with those decisions  
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25 <sup>1</sup> Plaintiff also argues that further discovery is necessary before certification of interlocutory appeal.  
26 The Court disagrees. The fundamental question is whether a bank's coverage of an overdraft constitutes  
27 "an extension of credit." No further factual development is necessary to decide this issue. Indeed this  
28 Court and all three other federal district court decisions to decide this issue did so on a motion to  
dismiss. See *Mcgee v. Bank of America, N.A.*, 2015 WL 4594582 (S.D. Fla 2015); *Shaw v. BOKF, Nat.*  
*Ass'n*, 2015 WL 6142903 (N.D. Okla. 2015); *In re TD Bank, N.A.*, 150 F. Supp. 3d 593 (D.S.C. 2015).

1 and explained why in its previous order denying BoA's motion to dismiss, the fact that all  
2 other decisions considering this issue reached a different conclusion strongly suggests  
3 that "reasonable jurists might disagree on [this] issue's resolution." *Reese v. BP*  
4 *Exploration (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011). Accordingly, the Court  
5 **GRANTS** BoA's motion to certify a permissive interlocutory appeal under 28 U.S.C. §  
6 1292(b).

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8 **III. CONCLUSION AND ORDER**

9 For the foregoing reasons, the Court **GRANTS** BoA's Motion to certify a  
10 permissive interlocutory appeal under 28 U.S.C. § 1292(b). In the interests of judicial  
11 efficiency, it is further ordered that this litigation is stayed until the Ninth Circuit decides  
12 either (1) not to hear this certified interlocutory appeal or (2) reaches a decision on the  
13 merits as to whether the Extended Charges constitute "interest" under the NBA. The  
14 parties shall notify the Court of the occurrence of either of the above events and, in the  
15 interim, provide joint status reports once every six months from the entry of this order.

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17 **IT IS SO ORDERED.**

18 Dated: April 11, 2017

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21 Hon. M. James Lorenz  
22 United States District Judge  
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